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PROGRESS CENTRE ENGINEERING SDN BHD v. DESARU CORNICHE HOTEL SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[ORIGINATING SUMMONS NO: WA-24C-187-09-2022]
B 20 MARCH 2023

Abstract – *The remedy under s. 30 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') ought to be invoked by the winning party in an adjudication proceeding upon satisfaction of the conditions therein. In this case, the main contractor had, via its agent, appointed the claimant as a sub-contractor. As both the main contractor and its agent is placed on the same lateral level in the chain of construction contract, the employer of the project is considered the 'principal' and is obligated to pay the adjudicated sum. The claimant has a right to invoke the direct payment mechanism as statutorily provided in the CIPAA.*

CONSTRUCTION LAW: *Adjudication decision – Claim for payment – Failure of main contractor to make payment to sub-contractor – Claim for direct payment of adjudicated amount from principal – Identifying 'principal' within meaning of s. 4 of Construction Industry Payment and Adjudication Act 2012 ('CIPAA') – Whether employer 'principal' of main contractor – Whether remedy under s. 30 of CIPAA could be invoked – Whether established conditions satisfied – Whether monies due and owing by principal*

This suit by the plaintiff against the defendants pursuant to s. 30 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') involved two main issues as to who was the 'principal' within the meaning of s. 4 of the CIPAA and whether there were monies due and owing by the 'principal' to MRCB Builders Sdn Bhd ('MRCB Builders'), the party against whom the adjudication decision ('AD') by the adjudicator in the adjudication proceedings between the plaintiff and MRCB Builders was made. In the originating summons ('OS'), the plaintiff sought an order for the first defendant, Desaru Corniche Hotel Sdn Bhd ('Desaru') or alternatively, the second defendant, Malaysian Resources Corporation Berhad ('MRCB') to pay the sum of RM1,071,856.25 ('adjudicated sum') to the plaintiff. By a letter of acceptance, Desaru had accepted MRCB's revised tender submission as the contractor for a project ('project') for the sum of RM211,600,000. Subsequently, *via* a letter of award ('LoA'), MRCB through its agent, MRCB Builders, had appointed the plaintiff as the subcontractor for the mechanical and electrical works in respect of the project ('M&E Works'). Due to MRCB Builder's purported non-payment of interim payment certificate ('IPC') No. 31 which was issued in the sum of RM1,071,856.25, the plaintiff served

a payment claim pursuant to s. 5 of the CIPAA to MRCB Builders. The adjudication proceedings resulted in the determination by the adjudicator, *ie*, that the respondent shall pay the claimant the adjudicated sum of RM1,071,856.25. The plaintiff forwarded the AD to MRCB Builders and demanded for the sums under the AD. MRCB Builders thereafter wrote to MRCB, seeking MRCB's position in relation to the plaintiff's demand. MRCB replied to MRCB Builders that, at all material times, the MRCB Builders was acting as an agent with ostensible authority to do all matters necessary, including the appointment of the subcontractor, in respect of the project. MRCB informed that it had yet to receive any payment from the employer in respect of the claims for the outstanding sum as mounted by the plaintiff in the adjudication and accordingly, there was no amount due and owing payable by MRCB to the plaintiff. MRCB Builders then wrote to the plaintiff, stating that the plaintiff was aware, and had accepted, that MRCB Builders was merely acting as an agent to MRCB in respect of the contract and that this was the finding in the AD. Subsequently, the plaintiff issued the request pursuant to s. 30(1) of the CIPAA to Desaru ('request-Desaru') for the adjudicated sum ('total adjudicated sum') which included party-to-party costs as well as fees and expenses, to be paid to the plaintiff. Desaru did not respond. The plaintiff additionally issued the request pursuant to the same provision of the CIPAA to MRCB ('request-MRCB') for the total adjudicated sum to be paid to the plaintiff. MRCB responded to the request-MRCB by way of a letter and stated that the correct party for the plaintiff to direct its claim would be against Desaru as the employer and 'principal' in the chain of contract. As no direct payment was forthcoming from Desaru or MRCB, the plaintiff brought the present application before this court.

Held (allowing plaintiff's application):

(1) There were certain conditions to be satisfied before the plaintiff could invoke the remedy in s. 30 of the CIPAA. The plaintiff had fulfilled condition (a) that there must be an adjudication decision whereby the winning party is entitled to an adjudicated amount which is to be paid by the losing party; and condition (b) the losing party had failed to pay the adjudicated amount to the winning party. The plaintiff was entitled to the total adjudication sum which was to be paid by MRCB Builders and MRCB Builders had failed to pay the same to the plaintiff. The plaintiff had also fulfilled condition (c) wherein the winning party had made a written request to the principal for the adjudicated amount to be paid directly to the winning party, irrespective of whether Desaru or MRCB was the 'principal' within the meaning of s. 4 of the CIPAA, the plaintiff had taken the safe path by sending the request-Desaru and request-MRCB to pay the total adjudicated sum directly to the plaintiff. The plaintiff had also fulfilled condition (d) wherein the principal did not serve a written notice to the losing party to show proof that the losing party had paid the adjudicated amount to the winning party or

having served such notice, the losing party had failed to furnish the proof of payment and in any event, the principal did not pay the adjudicated amount directly to the winning party. As Desaru and MRCB were each claiming that the other was the principal in the chain of construction contracts, neither party had served the written notice to MRCB Builders to show proof that MRCB Builders had paid the total adjudication sum to the plaintiff in accordance with the provision in s. 30(2) of the CIPAA. It was irrefutable that neither Desaru nor MRCB had paid the total adjudication sum to the plaintiff. (para 23)

(2) Although in the LoA, MRCB Builders was called the 'main contractor' and it had appointed the plaintiff as the 'subcontractor' for the M&E Works, in the adjudication proceedings, MRCB Builders, and in the present suit, MRCB, had both taken the consistent position that MRCB had appointed MRCB Builders to act as MRCB's agent to carry out all matters necessary relating to the project. MRCB affirmed that it had given MRCB Builders ostensible authority to enter subcontracts with subcontractors for the construction and completion of the project and that MRCB Builders operated as a single economic unit as part of MRCB. Similarly, the plaintiff's stand was that MRCB had appointed the plaintiff through its agent, MRCB Builders and therefore the employer and the principal for the project was Desaru. (para 32)

(3) The non-production of an agency agreement between MRCB and MRCB Builders was not fatal to MRCB's contentions on this issue, and nor should an adverse inference be drawn against MRCB, as the existence of a relationship of principal and agent could be inferred from the circumstances of the case. There was no evidence that Desaru had questioned the authority of a representative of MRCB Builder to sign the Employer's Representative's Instruction ('ERI') for and on behalf of MRCB in respect of the contract between Desaru and MRCB. In the circumstances, a principal-agent relationship between MRCB and MRCB Builders had been established by the plaintiff and MRCB, and this relationship was recognised and accepted by Desaru at all material times during the construction period. By its conduct, Desaru had treated MRCB and MRCB Builders as one and the same. Consequently, MRCB and MRCB Builders had been placed on the same lateral level in the chain of construction contracts as the main contractor for the project and this would mean that Desaru was the employer of the project and the 'principal' for purposes of s. 30 of the CIPAA. (paras 32-34)

(4) The plaintiff's claim for payment under IPC NO 31 was for six variation orders pursuant to the engineer's instructions ('EI'). However, Desaru had only certified and made payments for some of the EIs. To augment its point, MRCB had averred that for each outstanding EI, there was a corresponding ERI issued by Desaru to confirm and formalise the EI. In the premises, it could be safely concluded that there were monies due

or payable by Desaru to MRCB in respect of the variation orders, which was conceded by Desaru. The present application was initiated by the plaintiff, who was not a party to the dispute resolution agreement ('DRA') entered into by Desaru and MRCB. The DRA could not override the plaintiff's right to invoke the direct payment mechanism as statutorily provided in the CIPAA. (paras 41-45)

Case(s) referred to:

B Cor Geotechnics Sdn Bhd v. Panzana Enterprise Sdn Bhd [2019] 1 LNS 1393 HC ***(refd)***
Bond M&E Sdn Bhd v. PALI PTP Sdn Bhd [2022] 5 CLJ 543 ***(refd)***
Cabnet Systems (M) Sdn Bhd v Dekad Kaliber Sdn Bhd & Anor [2020] 1 LNS 187 HC ***(refd)***
Chong Lek Engineering Works Sdn Bhd v. PFCE Integrated Plant and project Sdn Bhd & Another Case [2020] 1 LNS 2251 HC ***(refd)***
CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd [2018] 1 LNS 380 HC ***(refd)***
Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd [2021] 1 LNS 429 HC ***(refd)***
HMN Nadhir Sdn Bhd v. Jabatan Kerja Raya Malaysia & Ors [2018] 1 LNS 1938 HC ***(refd)***
KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***
Murni Environmental Engineering Sdn Bhd v. Eminent Ventures Sdn Bhd & Anor And Other Cases [2016] 1 LNS 805 HC ***(refd)***
PCOM Pacific Sdn Bhd v. Apex Communications Sdn Bhd & Anor [2020] 1 LNS 130 HC ***(refd)***
Puncak Alam Housing Sdn Bhd v. Menta Construction Sdn Bhd & Anor [2013] 1 LNS 148 CA ***(refd)***
Sri Sutera Sdn Bhd v. Mohamed Abid And Another Appeal [2004] 1 CLJ 139 ***(refd)***
Yap Chee Hean v. Public Investment Bank Bhd [2014] 2 CLJ 1036 HC ***(refd)***
Zedelta Sdn Bhd v. Mayland Supreme Sdn Bhd [2023] 3 CLJ 977 HC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 4, 5, 30(1), (2), (3), (4)
Interpretation Acts 1948 and 1967, s. 17A

For the plaintiff - James Ding Tse Wen & Teoh Ting Wei; M/s C H Tay & Partners
For the 1st defendant - Raja Kumar Raja Kandan, Koh Yi Ting & Ng Chu Yin; M/s Azman Davidson & Co
For the 2nd defendant - Muhammad Faisal Moideen, Julian Ch'ng Wei Shen & Syaarifah Ameerah Syed Haja Muyinudeen; M/s Moideen & Max

Reported by Suhainah Wahiduddin

JUDGMENT

Aliza Sulaiman J:

Introduction

[1] This suit by the plaintiff against the defendants pursuant to s. 30 of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('CIPAA') involves two main issues as to who is the "principal" within the meaning of s. 4 of the CIPAA and whether there are monies due and owing by the "principal" to MRCB Builders Sdn Bhd ('MRCB Builders'), the party

against whom the adjudication decision dated 24 May 2022 ('AD') by the learned adjudicator Mr Sew Chee Hoong ('adjudicator') in the adjudication proceedings between the plaintiff and MRCB Builders was made.

[2] In the originating summons ('OS'), the plaintiff sought an order for the first defendant, Desaru Corniche Hotel Sdn Bhd ('Desaru') or alternatively, the second defendant, Malaysian Resources Corporation Berhad ('MRCB') to pay the sum of RM1,071,856.25 ('adjudicated sum') to the plaintiff immediately or within such period that the court thinks fit and proper.

[3] The matter was called for hearing on 16 January 2023 and was adjourned to today, 20 March 2023 for decision whereby, the court, after careful deliberation of the cause papers and submissions by the parties, has pronounced that Desaru is the "principal" and that there are monies due and owing by Desaru to MRCB Builders as at 27 July 2022. The plaintiff's application was accordingly allowed in that Desaru was ordered to pay the adjudicated sum together with interest, party-to-party cost and the costs and expenses of the adjudication as determined by the adjudicator within 14 working days of the decision of this court. Desaru was also ordered to pay cost of RM5,000 to the plaintiff, subject to allocator. As MRCB's counsel also prayed for cost and upon the plaintiff's counsel conceding that it is the plaintiff, and not Desaru, who had named MRCB as a party in this suit, and further, upon the plaintiff's counsel offer to pay RM5,000 as cost to MRCB, the court had ordered the plaintiff to pay cost of RM5,000 to MRCB, subject to allocator.

The Cause Papers

[4] The cause papers for this suit are as follows:

(i) the originating summons ('OS') dated 30 September 2022 (encl. 1);

(ii) the plaintiff's affidavit in support ('AIS') affirmed by its accounts & HR manager, Noor Husna binti Ab Rahman on 30 September 2022 (encl. 2);

(iii) MRCB's affidavit in reply ('AIR') affirmed by its group chief operating officer, Kwan Joon Hoe on 31 October 2022 (encl. 6);

(iv) Desaru's AIR affirmed by its group managing director, Stephanie Saw Ai Lin on 31 October 2022 (encl. 7);

(v) the plaintiff's affidavit (2) affirmed by the same deponent on 14 November 2022 (encl. 10);

(vi) MRCB's AIR affirmed by the same deponent on 29 November 2022 (encl. 13);

(vii) MRCB's further AIR affirmed by the same deponent on 30 November 2022 (encl. 15); and

(viii) Desaru's AIR (2) affirmed by the same deponent on 9 December 2022 (encl. 16).

Salient Facts

[5] The plaintiff, Desaru, MRCB and MRCB Builders are all companies which have been incorporated in Malaysia.

[6] The plaintiff has its business address at No. 40-1, Jalan PJS 1/50, Taman Petaling Utama Avenue, 46000 Petaling Jaya, Selangor.

[7] Desaru's registered address is at Level 8, Surian Tower, No. 1 Jalan PJU 7/3, Mutiara Damansara, 47810 Petaling Jaya, Selangor whilst MRCB's registered address is at Level 33A, Menara NU 2, No. 203 Jalan Tun Sambanthan, Kuala Lumpur Sentral, 50470 Kuala Lumpur.

[8] MRCB Builders is MRCB's wholly owned subsidiary company, and having its registered address at Level 33A, Menara NU 2, No. 203, Jalan Tun Sambanthan, Kuala Lumpur Sentral, 50470 Kuala Lumpur and business address at Level 30, Menara Allianz Sentral, No. 203, Jalan Tun Sambanthan, Kuala Lumpur Sentral, 50470 Kuala Lumpur.

[9] By the letter of acceptance dated 18 June 2015, Desaru had accepted MRCB's revised tender submission as the main contractor for the project known as "The Proposed Westin Desaru Resort at Desaru, Johor Darul Takzim for Desaru Corniche Hotel Sdn Bhd" ('project') for the sum of RM211,600,000 excluding goods and service tax.

[10] Subsequently, *via* a letter of award dated 1 December 2015 ('LoA), MRCB through its agent, MRCB Builders had appointed the plaintiff as the subcontractor for the mechanical and electrical works in respect of the project ('M&E Works') for the fixed lump sum amount of RM32,587,368.

[11] Due to MRCB Builders' purported non-payment of interim payment certificate ('IPC') No. 31 which was issued on 27 July 2021 in the sum of RM1,071,856.25, the plaintiff had on 24 November 2021 served a payment claim pursuant to s. 5 of the CIPAA to MRCB Builders.

[12] The adjudication proceedings which commenced on 21 December 2021, resulted in the following determination by the adjudicator:

> S. Determination
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> 115. I have carefully considered the evidence submitted to me in this adjudication proceedings. Based on the evidence, arguments and for all the reasons above, I accordingly Find, Declare, Determine And Award as follows:
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> (a) The Respondent shall pay the Claimant the adjudicated sum of RM1,071,856.25.

(b) The Respondent shall pay the Claimant simple interest per annum (see table below) for the Adjudicated Sum. The interest shall be calculated from the due date of the outstanding sum to the date of this decision tabulated as below:

Item	Description	Adjudicated Sum (RM)	Payment Due Date	Interest Rate (%)
1	Payment under Interim Payment Certificate No. 31	1,071,856.25	10.09.2021	5%

(c) The Respondent shall pay the Adjudicated Sum and the interest sum within fourteen (14) days from the date of this decision in the form of a secured financial instrument.

(d) The Claimant is entitled to a further simple interest per annum (see table above) for any amount of the Adjudicated Sum and interest sum remaining unpaid after fourteen (14) days from the date of this decision until actual payment.

(e) The Respondent shall pay the Claimant the sum of RM 35,000 as party-to-party cost within fourteen (14) days from the date of this decision.

(f) The Respondent shall pay the Claimant the sum of RM25,132.15 for the costs and expenses of the adjudication including the adjudicator's fees and expenses, AIAC's fees and expenses and all government taxes within fourteen (14) days from the date of this decision. Failing which, the Claimant is entitled to simple interest rate of 5% per annum until full payment.

(g) All other claims are hereby dismissed.

[13] On 7 June 2022, the plaintiff's solicitors forwarded the AD to MRCB Builders and demanded for the sums under the AD.

[14] MRCB Builders thereafter wrote to MRCB on 21 June 2022, enclosing the plaintiff's solicitors letter dated 7 June 2022 and seeking MRCB's position in relation to the plaintiff's demand.

[15] On 23 June 2022, MRCB replied to MRCB Builders that, at all material times, MRCB Builders was acting as an agent with ostensible authority to do all matters necessary, including appointment of the sub- contractor, in respect of the project. MRCB informed that it has yet to receive any payment from the employer in respect of the claims for the outstanding sum as mounted by the plaintiff in the adjudication and accordingly, there is no amount due and owing payable by MRCB to the plaintiff.

[16] MRCB Builders then wrote to the plaintiff's solicitor *vide* letter dated 29 June 2022, stating that the plaintiff is aware, and have accepted, that MRCB Builders was merely acting as an agent to MRCB in respect of the

contract and that this was the finding in the AD. Further, MRCB Builders conveyed the gist of MRCB's letter dated 23 June 2022 to the plaintiff's solicitor.

[17] Subsequently, on 27 July 2022, the plaintiff's solicitors issued the request pursuant to sub-s. 30(1) of the CIPAA to Desaru ('request-Desaru') for the adjudicated sum and interest of 5% per annum on the adjudicated sum from 10 September 2021 until 24 May 2022 amounting to RM37,735.21, RM35,000 as party-to-party costs and RM25,132.15 for the costs and expenses of the adjudication including the adjudicator's and AIAC's fees and expenses (these amounts shall hereinafter be referred to as the 'total adjudication sum') to be paid to the plaintiff's solicitors as stakeholder. Desaru did not respond to the request-Desaru.

[18] Out of the abundance of caution, on 27 July 2022, the plaintiff's solicitors additionally issued the request pursuant to the same provision of the CIPAA to MRCB ('request-MRCB') for the total adjudication sum to be paid to the plaintiff's solicitors as stakeholder. In sub-paras. 2(ii) and (iii) of the letter to MRCB, the plaintiff acknowledged that MRCB Builders was merely MRCB's agent in regard to the project and that the plaintiff was aware of this fact at all times.

[19] MRCB responded to the request – MRCB by way of its letter dated 28 July 2022 to the effect that the correct party for the plaintiff to direct its claim would be against Desaru as the employer and 11 "principal" in the chain of contract.

[20] As no direct payment was forthcoming from Desaru or MRCB, the plaintiff brought the present application before this court.

The Application Under Section 30 Of The CIPAA

[21] Section 30 of the CIPAA provides as follows:

> Direct payment from principal
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> 30. (1) If a party against whom an adjudication decision was made fails to make payment of the adjudicated amount, the party who obtained the adjudication decision in his favour may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made.
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> (2) Upon receipt of the written request under subsection (1), the principal shall serve a notice in writing on the party against whom the adjudication decision was made to show proof of payment and to state that direct payment would be made after the expiry of ten working days of the service of the notice.
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> (3) In the absence of proof of payment requested under subsection (2), the principal shall pay the adjudicated amount to the party who obtained the adjudication decision in his favour.

A (4) The principal may recover the amount paid under subsection (3) as a debt or set off the same from any money due or payable by the principal to the party against whom the adjudication decision was made.

(5) This section shall only be invoked if money is due or payable by the principal to the party against whom the adjudication decision was made at the time of the receipt of the request under subsection (1).

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[22] The conditions which have to be satisfied before the plaintiff can invoke the remedy in s. 30 of the CIPAA are well established, namely:

(i) there must be an adjudication decision whereby the winning party is entitled to an adjudicated amount which is to be paid by the losing party;

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(ii) the losing party has failed to pay the adjudicated amount to the winning party;

(iii) the winning party has made a written request to the principal for the adjudicated amount to be paid directly to the winning party;

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(iv) the principal did not serve a written notice to the losing party to show proof that the losing party has paid the adjudicated amount to the winning party or having served such notice, the losing party has failed to furnish the proof of payment and in any event, the principal did not pay the adjudicated amount directly to the winning party; and

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(v) there is money due or payable by the principal to the losing party at the time when the principal receives the written request for payment from the winning party

(see among others: *Murni Environmental Engineering Sdn Bhd v. Eminent* F *Ventures Sdn Bhd & Anor And Other Cases* [2016] 1 LNS 805; [2016] MLJU 691; *CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd* [2018] 1 LNS 380; [2017] MLJU 2275; *HMN Nadhir Sdn Bhd v. Jabatan Kerja Raya Malaysia & Ors* [2018] 1 LNS 1938; [2018] MLJU 1859; *B Cor Geotechnics Sdn Bhd v. Panzana Enterprise Sdn Bhd* [2019] 1 LNS 1393; [2019] MLRHU 1040; G *Cabnet Systems (M) Sdn Bhd v. Dekad Kaliber Sdn Bhd & Anor* [2020] 1 LNS 187; [2020] 3 MLRH 83; *Glocal Tech Engineering Sdn Bhd v Panzana Enterprise Sdn Bhd* [2021] 1 LNS 429; [2021] MLJU 474; and *Zedelta Sdn Bhd v. Mayland Supreme Sdn Bhd* [2023] 3 CLJ 977; [2023] MLJU 77).

[23] In this case:

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(i) the plaintiff has undoubtedly fulfilled conditions (i) and (ii) in para. 22 above as there is clearly, the AD wherein the plaintiff is entitled to the total adjudication sum which is to be paid by MRCB Builders and MRCB Builders has failed to pay the same to the plaintiff as at the date of filing of the OS;

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(ii) with regards to condition (iii), irrespective of whether Desaru or MRCB is the "principal" within the meaning of s. 4 of the CIPAA, the plaintiff has taken the safe path by sending the request-Desaru and request-MRCB to pay the total adjudication sum directly to the plaintiff;

(iii) with regards to condition (iv), as Desaru and MRCB are each claiming that the other is the principal in the chain of construction contracts, neither party had served the written notice to MRCB Builders to show proof that MRCB Builders has paid the total adjudication sum to the plaintiff in accordance with the provision in sub-s. 30(2) of the CIPAA. It is irrefutable that neither Desaru or MRCB has paid the total adjudication sum to the plaintiff; and

(iv) with regards to condition (v), this is one of the two issues to be resolved in this suit.

First Issue: Who Is The "Principal" In This Matter?

The Parties' Submissions

[24] The word "principal' is defined in s. 4 of the CIPAA to mean "a party who has contracted with and is liable to make payment to another party where that other party has in turn contracted with and is liable to make payment to a further person in a chain of construction contracts".

[25] The plaintiff's position on this matter is straightforward, namely that:

(i) the word "principal' in s. 4 of the CIPAA is not limited between the plaintiff, MRCB and MRCB Builders only as the interpretation provision as above quoted includes the words "... to a further person in a chain of construction contracts";

(ii) there is a principal-agent relationship between MRCB and MRCB Builders. This is consistent with the position taken by the plaintiff in the adjudication proceedings, and this was determined by the adjudicator in the plaintiff's favour (see: paras. 81 to 83 under Issue No. 1 Whether the Respondent is the agent for MRCB in the AD, exh. "A-1" in the plaintiff's AIS, encl. 2). Legally, MRCB and MRCB Builders are to be treated as a unified entity (see *Yap Chee Hean v. Public Investment Bank Bhd* [2014] 2 CLJ 1036; [2014] 8 MLJ 494); and

(iii) as there is no dispute between the plaintiff and MRCB Builders with regards to the principal-agent relationship, although the AD is against MRCB Builders, the same liability is extended on MRCB by virtue of the agency principle. Hence, the "principal" for purposes of the s. 30 of the CIPAA application would be Desaru.

[26] MRCB took a similar stance as the plaintiff. It was further submitted that:

(i) MRCB appointed MRCB Builders to act as its agent to carry out all the matters necessary in relation to the project whereby ostensible authority was given to MRCB Builders to enter into subcontracts with subcontractors for the construction and completion of the project;

(ii) the relationship between MRCB and MRCB Builders was within the full knowledge of Desaru and accepted by Desaru as evidenced by the fact that Desaru had accepted MRCB Builders' signature on the "contractor's acknowledgement portion of the employer's representative's instructions ('ERI') which was issued by Desaru to MRCB even though the contract is ostensibly between MRCB and Desaru;

(iii) the appointment of an agent does not need to be in writing and the existence of a relationship of principal and agent can be inferred from the circumstances of the case; and

(iv) Desaru should be regarded as the "principal" under s. 4 of the CIPAA because MRCB and MRCB Builders should be treated as a single entity in the chain of construction contracts. Moreover, there is no set boundary to the definition of "principal" and the term is wide enough to include an employer, a main contractor or a subcontractor in a chain of construction contracts, and specifically, Desaru, in line with the spirit and intent of the CIPAA and s. 17A of the Interpretation Acts 1948 and 1967 [Act 388].

[27] At the opposite end, Desaru strenuously asserted that MRCB is the defined principal under ss. 4 and 30 of the CIPAA with the plaintiff as the winning party and MRCB Builders as the losing party in the adjudication. Desaru relied on the fact that MRCB Builders has been making payments directly to the plaintiff for works done.

[28] Desaru also sought to distinguish the decision in *Yap Chee Hean* (*supra*) on the ground that, in that case, an agreement was entered into between the parties clearly stipulating the agency relationship whereas in the present case before this court, MRCB did not produce any agency agreement between itself and MRCB Builders.

[29] It was further emphasised that, in the LoA, MRCB addressed itself as the "main contractor' and had appointed the plaintiff as the "subcontractor' for the M&E Works. There was no express provision that MRCB Builders was acting as the agent of MRCB.

The Findings Of The Court

[30] As alluded to earlier, at the adjudication, the adjudicator had considered the statements in the adjudication response and adjudication reply and found that there is no question as to the existence of a principal-agent relationship between MRCB and MRCB Builders (paras. 81 to 83 of the AD).

[31] The adjudicator then analysed Issue No. 2: What is the limit of authority if the respondent is the agent for MRCB and adverted to the fact that MRCB Builders refused to disclose the agency agreement entered into between MRCB and MRCB Builders despite the adjudicator's request for it *vide* Procedural Order No. 3 so as to understand the limit of authority given by MRCB to MRCB Builders and whether the latter had acted *intra vires* or *ultra vires*. The reason for the refusal is that the agreement contains sensitive information. In the absence of the agency agreement, the adjudicator looked to the terms of the LoA and upon his review of the IPCs, invoices and payment proof in the plaintiff's further submission, he determined that payments were made by MRCB Builders to the plaintiff; the obligation to make payment for the plaintiff's work rests with MRCB Builders; and the contractual obligation to make payment for work done ought reasonably to be performed by MRCB Builders (see paras. 84 to 92 in the AD).

[32] Desaru has, of course, correctly submitted that this court is not bound to follow the decision of the adjudicator on the issue of whether MRCB Builders is the agent for MRCB. This court has to make its own independent assessment of the matter based on the averments and submissions of the parties in this suit. After careful consideration of the same, the court makes the following findings:

(i) although in the LoA, MRCB Builders was called the "main contractor' and it had appointed the plaintiff as the "subcontractor' for the M&E Works, in the adjudication proceedings, MRCB Builders, and in the present suit, MRCB, have both taken the consistent position that MRCB had appointed MRCB Builders to act as MRCB's agent to carry out all matters necessary relating to the project. MRCB affirmed that it has given MRCB Builders ostensible authority to enter subcontracts with sub-contractors for the construction and completion of the project and that MRCB Builders operates as a single economic unit as part of MRCB (see: para 9, encl. 6). Similarly, the plaintiff's stand is that MRCB has appointed the plaintiff through its agent, MRCB Builders and therefore the employer and the principal for the project is Desaru (see paras. 4 and 5, encl. 2).

(ii) the non-production of an agency agreement between MRCB and MRCB Builders is not fatal to MRCB's contentions on this issue, and nor should an adverse inference be drawn against MRCB, as the existence of a relationship of principal and agent can be inferred from the circumstances of the case.

in *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233, the Court of Appeal heard the appeal against the decision of the High Court in entering summary judgment in favour of the respondent. The respondent, who carried on the business of an insurance agent, alleged that it had appointed the appellant as its sub-agent to sell

policies of Mercantile Insurance Sdn Bhd to the public. The respondent had sent statements of account to the appellant which reflected the money which had been received by the appellant from the sales that he had made. However, the appellant failed to pay the respondent and in its defence to the suit initiated by the respondent, the appellant denied the sub-agency. In the appeal, the appellant argued, *inter alia*, that the judge was wrong as the respondent had not produced any written agreement to support its claim that the appellant had been appointed as its sub-agent. Gopal Sri Ram CJA in delivering the judgment of the court dismissing the appeal, held at pp. 237 to 238 that:

> In the first place, *the law does not require that an agency or sub-agency agreement must be in writing*. See *Bowstead & Reynolds on Agency* (17th Ed) at p 55 et seq.
>
> Further, *Part X of the Contracts Act 1950, which contains the relevant provisions on agency does not contain any requirement that the appointment of an agent or sub-agent has to be in writing or be evidenced in writing. Hence the appointment may be express or implied, that is to say, it may be gathered from the facts and circumstances of a case and from the conduct of the parties*: see, *Kuchwar Lime & Stone Co v. Dehri Rohtas Light Railway & Co Ltd* AIR 1969 SC 193.
>
> Another way of stating the proposition is that *a party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal*.
>
> Viewed in this way, we perceive that *the key to the whole case lies in the conduct of the appellant in this case*. Encik Darshan Singh, in response to a question put to him by a member of the panel hearing this appeal, frankly conceded that his client did indeed receive the statements of account of which we have earlier spoken. It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any liability.
>
> But that is not what happened. The appellant remained silent, held onto the accounts, and did nothing about it. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account.
>
> ...
>
> ... We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.

> To put it another way, *the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties* or to the figure which the account showed as owing by it. *Having done so, it ought not to be permitted to now contend otherwise.*
>
> It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and is now beyond question. See *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

In the case which was cited by MRCB's counsel namely, *Sri Sutera Sdn Bhd v. Mohamed Abid And Another Appeal* [2004] 1 CLJ 139; [2004] 2 MLJ 321, reference was made to the decision of the Court of Appeal as above cited in the following passage at p. 143 (CLJ); p. 326 (MLJ):

> [5] On the issue of agency, the learned judge concluded that from the evidence he found as a fact that the second defendant was an agent of the first defendant with authority to bind the first defendant as shown by the fact that he could sign for and on behalf of the first defendant in respect of the agreement with the said Tengku Ahmad Faizal. *He relied on the authority of KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 1 MLJ 233, where the court held that the appointment of an agent need not be in writing and that the existence of a relationship of principal and agent can be inferred from the circumstances of the case*. He also referred to *Treitel in the Law of Contract* (1995 Ed) which listed the four conditions that ought to be satisfied before apparent or ostensible authority arises and concluded that the facts clearly showed all the conditions had been satisfied. In arriving at such conclusion, he also took into account of the fact that: (i) the second defendant had admitted to the plaintiff that he was a director of the first defendant; (ii) when the plaintiff first met DW1 concerning his claim to the cars DW1 did not dispute the representation that the second defendant was a director of the first defendant; (iii) DW1 signed the letter of confirmation as stated in para. 4 above; and (iv) the plaintiff and PW2 believed that the second defendant was acting as the agent of the first defendant because they believed that as an individual the second defendant would not have been able to obtain more than one AP, as deposed without challenge.
>
> [6] A scrutiny of the judgment will reveal that the learned judge came to his findings and conclusions on the issue of agency based on the totality of the evidence adduced, that is to say, the combined effect of the events that took place from the time when the oral agreement was concluded between the plaintiff

A

> and the second defendant in the middle of 1992 until 2 December 1992 when the letter of confirmation was issued by DW1 to the plaintiff. We are satisfied with the approach taken by the learned judge in considering the issue.

To further strengthen his arguments, MRCB's counsel additionally referred to s. 140 Contracts Act 1950 [Act 136] which stipulates as follows:

B

> An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.
>
> (emphasis added)

C

(iii) in the Employer Representative's Instruction ('ERI') Nos. 125-EI-WSP-WD-002, 128-EI-WSP-WD-005 and 131-EI-WSP-WD-008 (see exh. "MRCB-9", encl. 13), Rozai bin Rosli, MRCB Builder's project director has signed in the contractor's acknowledgement column on 24 July 2018 and 27 July 2018 while Muhinder Singh has placed his signature as the employer's representative on 23 July 2018 and 27 July 2018. There is no evidence that Desaru had questioned the authority of a representative of MRCB Builder to sign the said ERIs for and on behalf of MRCB in respect of the contract between Desaru and MRCB.

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[33] In the circumstances, the court is satisfied that a principal-agent relationship between MRCB and MRCB Builders has been established by the plaintiff and MRCB, and this relationship was recognised and accepted by Desaru at all material times during the construction period.

F

[34] By its conduct, Desaru has treated MRCB and MRCB Builders as one and the same. Consequently, MRCB and MRCB Builders have been placed on the same lateral level in the chain of construction contracts as the main contractor for the project and this would mean that Desaru is the employer of the project and the "principal" for purposes of s. 30 of the CIPAA.

G

Second Issue: Whether There Are Monies Due And Owing By Desaru As The Principal To MRCB Builders At The Time Of Desaru's Receipt Of The Request – Desaru On 27 July 2022

[35] In para. 11 of Desaru's AIR (encl. 7), Desaru affirmed that it was only notified by the plaintiff's solicitors *via* the letter dated 27 July 2022 that the plaintiff has obtained the AD against MRCB Builders and that the plaintiff is now seeking for a direct payment from Desaru. However, unlike MRCB (see para. 20 in MRCB's second AIR, encl. 6 where the date of receipt is stated as 27 July 2022), Desaru did not aver as to the exact date that it had received the plaintiff's request.

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[36] In exh. "A-3" in the plaintiff's AIS (encl. 2), Themed Attractions Resorts 7 Hotels Sdn Bhd had acknowledged receipt of the request – Desaru by signing and placing its chop on the service copy. The date as can be seen in the chop is 27 July 2022.

[37] Desaru did not raise any issue concerning the service of the request-Desaru. In the circumstances, and for purposes of analysing the second issue, the date on which Desaru received the request-Desaru is taken as 27 July 2022.

The Parties' Submissions

[38] The plaintiff submitted that Desaru is obligated to make payment of the adjudicated sum to the plaintiff pursuant to sub-s. 30(3) of the CIPAA as Desaru did not issue the notice as required under sub-s. 30(2) of the CIPAA in line with the authority in *PCOM Pacific Sdn Bhd v. Apex Communications Sdn Bhd & Anor* [2020] 1 LNS 130; [2020] MLJU 118. The non-issuance of the said notice is said to be fatal and Desaru could no longer raise the argument that there are no monies due or payable to MRCB.

[39] However, Desaru countered this contention by relying on the decisions in *CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd* [2018] 1 LNS 380; *Chong Lek Engineering Works Sdn Bhd v. PFCE Integrated Plant and project Sdn Bhd & Another Case* [2020] 1 LNS 2251; [2020] MLJU 2389 and *Glocal Tech Engineering Sdn Bhd* (*supra*) in arguing that, even if Desaru is regarded as the principal, s. 30 of the CIPAA cannot be invoked against Desaru as there is no sum due and/or payable by Desaru to MRCB because:

(i) upon the assessment and valuation by KPK Quantity Surveyors (Semenanjung) Sdn Bhd, the quantity surveyor for the contract between Desaru and MRCB, there is a sum of RM55,016,034.64 which is due and/or payable by MRCB to Desaru under Interim Certificate No. 45, being the value of the non-conformance works, defect rectification works and liquidated and ascertained damages ('LAD') imposed on MRCB; and

(ii) in view of the Dispute Resolution Agreement ('DRA') entered into by Desaru, Desaru Convention Centre Sdn Bhd, Desaru Estate Sdn Bhd, Desaru Peace Holdings Club Sdn Bhd and Desaru Peace Holdings Villas Sdn Bhd and MRCB on 3 December 2019, the parties thereto have agreed to fully and comprehensively resolve all their disputes by way of arbitration in accordance with the arbitration clauses in the respective construction contracts, including the contract between Desaru and MRCB dated 24 March 2016 in respect of the project. Hence, even if there were claims made by the plaintiff to MRCB, such claims are not due and payable as between Desaru and MRCB until the final determination of the ongoing arbitration. Desaru relied on the case authority of *Puncak Alam Housing Sdn Bhd v. Menta Construction Sdn Bhd*

& Anor [2013] 1 LNS 148; [2014] 1 MLJ 287 to support its argument that a court shall be cautious in deciding whether to interfere with settlement agreements between the parties.

[40] MRCB retorted that there is in fact monies due and owing from Desaru to MRCB and/or MRCB Builders as:

(i) the sum of RM55,016,034.64 allegedly due and/or payable by MRCB to Desaru shows that there is in fact monies due and owing under Interim Certificate No. 45. However, these monies have been zeroised by Desaru by unilaterally imposing claims of, *inter alia*, LAD on MRCB which is disputed in arbitration;

(ii) sub-s. 30(4) of the CIPAA allows Desaru to recover the said amount either as a debt or as set-off from MRCB. Any adjustments for the amount payable can be made in arbitration; and

(iii) the instant application is not caught by the DRA and in any event, the DRA cannot operate to restrict the enforcement of a statutory right under s. 30 of the CIPAA by the plaintiff to seek direct payment from Desaru.

The Findings Of The Court

[41] The court has scrutinised the parties' averments, and in particular paras. 10 to 15 of MRCB's second AIR (encl. 13) and finds that the plaintiff's claim for payment under IPC No. 31 is for six variation orders pursuant to the Engineer's Instructions ('EI') EI-WSP-WD-002, EI-WSP-WD-005, EI-WSP-WD-006, EI-WSP-WD-008, EI-WSP-WD-009 and EI-WSP-WD-010. However, Desaru has certified and made payments only in respect of the following:

(i) EI-WSP-WD-006 for additional pressurisation system and smoke fill system for the sum of RM320,000;

(ii) EI-WSP-WD-009 for additional works for street lighting in the sum of RM210,000; and

(iii) EI-WSP-WD-010 for additional works for telephone & structure cabling system in the sum of RM276,684.

[42] The total amount paid for the above stated variation orders is RM806,684 *vide* Interim Certificate No. 36 dated 13 September 2018 (see exh. "MRCB-8", encl. 13 and Desaru's letter dated 5 February 2021 to MRCB in exh. "SAL-2", encl. 7 wherein MRCB stated that it will be making payment of a total sum of RM11,277,431.25 being the payments for the sums certified in Interim Certificate Nos. 36 to 45, which includes the sum of RM5,473,502.42 for Interim Certificate No. 36, out of which the sum of RM1,000,744.31 is for variation works done).

[43] To augment its point, MRCB has averred that for each outstanding EI, there is a corresponding ERI issued by Desaru to confirm and formalise the EI as illustrated below:

EI	ERI
EI-WSP-WD-002	ERI 125
EI-WSP-WD-005	ERI 128
EI-WSP-WD-008	ERI 131

[44] In the premises, it can be safely concluded that there are monies due or payable by Desaru to MRCB in respect of the variation orders under EI-WSP-WD-002, EI-WSP-WD-005 and EI-WSP-WD-008 and this was conceded by Desaru's counsel during the hearing on 16 January 2023.

[45] Finally, with regards to the submission based on the DRA, in my opinion, MRCB's points in refuting Desaru's reliance on the DRA are sound in law. The case as cited by Desaru does not concern an application under s. 30 of the CIPAA. The present application was initiated by the plaintiff, who is not a party to the DRA. The DRA cannot override the plaintiff's right to invoke the direct payment mechanism as statutorily provided in the CIPAA. I agree with MRCB's submission that Desaru's DRA-related argument is nothing more than a red herring.

Pronouncement

[46] Premised on all the above said considerations, the plaintiff's application was allowed in the terms as set out in para. 3 of this judgment.

[47] The decision to order Desaru to pay interest on the adjudicated sum, party-to-party cost and the costs and expenses of the adjudication, apart from the adjudicated sum as prayed in para. (i) of the OS, was made under para. (iii) of the same as the court takes the view that it is fit and proper for the total adjudication sum to be paid directly by Desaru to the plaintiff consistent with the decision of the Court of Appeal on 9 December 2022, in reversing the decision of this court in *Bond M&E Sdn Bhd v. PALI PTP Sdn Bhd* [2022] 5 CLJ 543; [2022] 11 MLJ 58; [2022] 5 MLRH 279, that a proper construct of the term 11 "adjudicated amount" in s. 30 of the CIPAA would include both interest and costs awarded in the adjudication decision.